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No. 94-1559

In The

Supreme Court of the United States

October Term, 1994

BURT HAMROL,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
A Municipal Corporation,

Respondent.

On Petition For Writ Of Certiorari
To The California Court Of Appeal

BRIEF IN OPPOSITION

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CITY AND COUNTY OF SAN FRANCISCO,
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BRIEF IN OPPOSITION

Respondent City and County of San Francisco (the "City") opposes the Petition for Writ of Certiorari filed by Petitioner Burt Hamrol ("Hamrol") and prays that the Writ be denied. The California Court of Appeal correctly affirmed the City's right to collect its Transit Impact

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NOTE: For consistency, we use the citation format suggested by Appellant. Footnotes are omitted and emphasis is ours unless otherwise stated in all quoted material. With respect to the record before the California Court of Appeal, "RT" refers to the Reporter's Transcript; "AA" refers to the Appellant's Appendix and "RA" refers to Respondent's Appendix. We refer to trial exhibits by exhibit number and include a page reference in the appropriate appendix.

Development Fee ("TIDF") from Hamrol for the privilege of developing an office building in San Francisco.

INTRODUCTION AND SUMMARY OF ARGUMENT

The TIDF Ordinance (S.F. Admin. Code §§ 38.1 et seq., Pl.Exh. 3, R.A. 1-15) authorizes the City to collect a fee from every developer of new office buildings in a defined area of San Francisco. The fee helps defray the City's incremental costs of expanding and operating public transit to meet the increased demand caused by the new developments. The California Court of Appeal has upheld the right of the City to collect the TIDF from Hamrol, who developed a new office building after passage of the Ordinance.

The TIDF Ordinance survived constitutional challenges in *Russ Bldg. Partnership v. City and County of San Francisco,* 199 Cal.App.3d 1496, 246 Cal.Rptr. 21 (1987) ("*Russ Bldg. I*"), reprinted as directed by the California Supreme Court in *Russ Bldg. Partnership v. City and County of San Francisco,* 44 Cal.3d 839, 854-55, 244 Cal.Rptr. 682, 750 P.2d 324, *appeal dismissed sub nom. Crocker National Bank v. City and County of San Francisco,* 488 U.S. 881 (1988) ("*Russ Bldg. II*"). The Ordinance also survived challenges that it was unconstitutional as applied to buildings approved prior to passage of the Ordinance, but with transit mitigation conditions attached to their approvals. *Russ Bldg. II; Blue Jeans Equities West v. CCSF,* 3 Cal.App.4th 164, 4 Cal.Rptr.2d 114, *cert. denied,* 113 S.Ct. 191 (1992).

Nevertheless, Hamrol contends that the Ordinance should not apply to him. Citing *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994), Hamrol claims that the City should have made an individualized determination of the transit impact generated by his building before imposing the TIDF on him.

Dolan, however, does not apply to a development fee ordinance of general application such as the TIDF Ordinance. *Dolan* expressly applies to an adjudicative decision conditioning a developer's permit on an individual parcel. *Id.* at 2314.

Of greater relevance to this case is this Court's unanimous decision in *U.S. v. Sperry Corp.*, 493 U.S. 52 (1989). In *Sperry*, this Court held that a legislatively imposed user fee was not a "physical appropriation of property" and need only approximate the cost of benefits supplied to withstand a takings challenge.

Thus, Hamrol is simply wrong in asserting that the Court of Appeal failed to follow Supreme Court precedent or that its decision conflicts with decisions of this Court. This case raises no new issue worthy of this Court's attention.

STATEMENT OF THE CASE

The City submits this Statement of the Case to provide the Court with a more complete background of the TIDF Ordinance and related litigation, and to give this Court a better understanding of the unusual facts of this case.

A. The TIDF Ordinance

The TIDF Ordinance was a legislative solution to a problem that had been escalating for years prior to passage of the Ordinance. Office construction in the downtown area of San Francisco had proliferated, placing increasing demands on an already overburdened public transit system. Faced with the need to expand transit capacity for the additional employees generated by office development, the City's Public Utilities Commission ("PUC") studied the incremental cost to the City's transit system (the "Municipal Railway" or "Muni") of providing additional peak period service. The study concluded that it would cost Muni $6.57 per square foot of new office space to provide the expanded service over the projected 45-year life of each new office building. *Russ Bldg. I*, 199 Cal.App.3d at 1503 n.2.

The City enacted the TIDF Ordinance in May 1981. (Pl. Exh. 3, R.A. 1-5.) The City's Board of Supervisors chose to limit the TIDF rate to $5.00 per square foot of new office space. (Pl. Exh. 3, § 38.5, R.A. 6-7.)[1]

The TIDF Ordinance entitles the City to recover from the developers of new office space in the "downtown

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[1] In response to a legal challenge to the Ordinance (*see* discussion, *infra*), the City engaged Touche-Ross and Co. to conduct an independent evaluation of the cost bases for the Ordinance. After completing the study, Touche-Ross concluded that the actual cost per square foot to provide the additional needed transit service was $8.36. *Russ Bldg. I* at 1503 n.2. The Board of Supervisors subsequently adopted the Touche-Ross report, its assumptions, methodology and conclusions as official Board policy. The Board, however, did not raise the TIDF rate.

area" of San Francisco a portion of the City's incremental cost of expanding and operating public transit to meet the demand created by the new office development. (Pl. Exh. 3, §§ 38.2, 38.3, R.A. 2-4.) The TIDF Ordinance states its purpose in relevant part as follows:

> It is the purpose of this ordinance to require developers of new development in the downtown area to pay a fee *which is related directly to the incremental financial burden imposed on the Municipal Railway*. . . .
>
> This fee is intended to recover all costs incurred by the Municipal Railway in meeting peak-period public transit service demands created by office uses in each new development subject to the fee, including the expansion of service capacity through the purchase of rolling stock, the installation of new lines, the addition to existing lines and the long term operation, maintenance, repair and replacement of those expanded facilities.
>
> The Transit Impact Development Fee is the most practical and equitable method of financing the construction and operation of required public transit service additions and improvements for the downtown area.

[Pl. Exh. 3, § 38.3. (Emphasis added.)]

B. Appellate Decisions on TIDF Ordinance

Prior to this case, three appellate decisions have upheld the City's position on the TIDF Ordinance. In *Russ Bldg. I, supra*, 199 Cal.App.3d 1496, the California Court

of Appeal upheld the constitutionality of the TIDF Ordinance. The Court rejected claims that the TIDF was a "special tax" under Article XIII A, section 4 of the California Constitution, and that the TIDF violated federal and state equal protection and substantive due process guarantees. *Id.* at 1506-09, 1516. Specifically, the court found that imposition of fee was not an unconstitutional taking of plaintiffs' property. *Id.* at 1509.

Russ Bldg. I was a class action. *Id.* at 1502, n.1. Hamrol stipulated that he, or his predecessor in interest, was a member of the class and bound to the extent the class was bound. (A.A. 3, ¶ 1.)

In *Russ Bldg. II*, the California Supreme Court declined to review the portion of the Court of Appeal decision in *Russ Bldg. I* upholding the TIDF Ordinance. 44 Cal.3d at 854-55. Instead, the Court addressed the application of the Ordinance to the two office projects approved prior to enactment of the Ordinance. The Court upheld that application, determining that transit mitigation conditions in the developers' permits put the developers on notice of their obligation to contribute to public transit by a mechanism such as the TIDF. *Id.* at 846-53. The court concluded that imposition of the TIDF did not impair the developers' vested rights. *Id.* at 853-54.[2]

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[2] Plaintiffs in *Russ Bldg. II* also asked the court to consider the applicability of this Court's decision in *Nollan v. California Coastal Commission, infra*, 483 U.S. 825, to the TIDF. The California Supreme Court chose not to so expand the issues. 44 Cal.3d at 845, n.6. Notably, the class certification in *Russ Bldg.*, reveals that the *constitutionality* of the Ordinance *as applied to all members of the class* was an issue of law common to all class members.

Blue Jeans Equities West, supra, 3 Cal.App.4th 164, the most recent TIDF decision, also concerned a project that had been approved prior to passage of the Ordinance. The City Planning Commission's approval resolution contained a condition concerning transit mitigation similar to the ones at issue in *Russ Bldg. II.* The Court of Appeal rejected the developer's argument that to withstand a takings challenge under *Nollan v. California Coastal Commission, supra,* 483 U.S. 825 (1987), the City must demonstrate a nexus between the amount of the fee and the individual impact on transit generated by each development. The court held that any "heightened scrutiny"

(Pl. Exh. 36, R.A. 91.) On this basis, the trial court found the doctrine of *res judicata* would bar Hamrol from pursuing his claim. The trial court reasoned as follows:

> [A] judgment is binding as to all matters "within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised." *Sutphin v. Speik,* 15 Cal.2d 195, 202 (1940) (emphasis by court); *Takahashi v. Board of Education,* 202 Cal.App.3d 1464, 1481 (1988); *Cal. Coastal Commission v. Superior Court,* 210 Cal.App.3d 1488, 1499 (1989). Although the *Russ Bldg. I* Court did not specifically address the constitutionality of the Ordinance under the Fifth Amendment, such an argument merely constitutes another theory to strike down the Ordinance as applied to Hamrol. Such arguments could have been made in his behalf in *Russ Bldg. I.*

After declining to review the Court of Appeal's decision as to the constitutionality of the Ordinance, the *Russ Bldg. II* court did not choose to then expand the issues to consider whether the TIDF constituted an unconstitutional taking. The constitutionality of the Ordinance as applied to the *Russ Bldg. I* class was a settled issue. *Res judicata* would then apply to bar Hamrol's Fifth Amendment defense in this case.

required by *Nollan* applied only to "possessory takings" cases, where there is a physical intrusion onto property as a result of governmental action. The court concluded that *Nollan* did not apply to actions involving "regulatory takings," such as those actions challenging zoning restrictions or development fees. 3 Cal.App.4th at 166, 171. As with *Russ Bldg. II*, this Court did not disturb the California court's decision in *Blue Jeans*. 113 S.Ct. 191.

C. Statement of Facts.

Unlike the *Russ Bldg.* cases and *Blue Jeans, supra,* this case is a collection action. Hamrol never filed an action to protest imposition of the fee; he simply did not pay it, even though payment was a condition of getting a permit of occupancy on the building. (Pl. Exh. 3, R.A. 4.) Following is a summary of the pertinent events that preceded and precipitated the City's filing of this action.

1. The Lease Negotiations.

Burt Hamrol is an experienced contractor and developer. (R.T. 268:8-269:14.) He owns property in three counties in California, including an entire block and half in one neighborhood in San Francisco. (R.T. 269:15-270:12.)

In the mid-1980's, Hamrol negotiated a lease for the Property with Gerald Romani, Jr., of the City's Real Estate Department. (R.T. 233:12-17.) The City needed new space to house the Public Defender's Office and two other City agencies, which were in overcrowded conditions in the nearby Hall of Justice. (R.T. 144:27-145:4.) The City agreed to pay fair market rental value for the Property, and

Hamrol included in that rental value his project costs in constructing a building to the City's specifications. (R.T. 189:7-190:2; 228:6-19; 308:13-17.) The lease was signed on August 1, 1985, but did not commence until after completion of construction of the improvements and acceptance by the City. (Def. Exh. 1003, R.A. 123, 129.)

Hamrol was aware of the TIDF before the project started. (R.T. 312:17-22.) During the course of negotiations, Hamrol discussed the TIDF with Romani. Romani testified that he reviewed a copy of the TIDF Ordinance and thought that the TIDF would not apply to the Property. (R.T. 216:14-15.) Romani conveyed his opinion to Hamrol, but never told Hamrol that he would not have to pay the TIDF. (R.T. 225:22-23.)[3]

2. Hamrol's Building Permit Application.

On November 1, 1985, Hamrol applied for a permit to develop the Property. (Pl. Exh. 6, R.A. 6.) Section 38.8 of the TIDF Ordinance requires that prior to obtaining a building permit, the developer file with the General Manager of the PUC a report stating the number of gross

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[3] At trial and on appeal, Hamrol argued that the City should be estopped from collecting the TIDF based on Romani's opinion that the TIDF would not be applicable to the Property. Both the trial court and the Court of Appeal rejected that argument. (Pet., 5a-6a; A.A. 16-20). Hamrol did not renew the estoppel argument in his request for hearing to the California Supreme Court. Therefore, contrary to Hamrol's implication in his petition, the "reasonableness" of Hamrol's or Romani's beliefs regarding the applicability of the Ordinance are no longer at issue on appeal.

square feet of office space in the new development.[4] The General Manager then makes a determination of the number of gross square feet of office space to which the TIDF applies, applies the fee schedule, and determines the fee. (*See* Pl. Exh. 3, R.A. 9-10.)

On March 14, 1986, the PUC's TIDF Administrator, Leonard Tom, issued a Final Determination of the TIDF in the amount of $159,500. (Pl. Exh. 8, R.A. 20.) Tom obtained information about the square footage in the building from Romani, who was acting as a liaison between Hamrol and the PUC to expedite issuance of the permit. (R.T. 59:27-60:13; 139:15-27; Pl. Exh. 7, R.A. 18-19.) Tom also testified that Romani requested an exemption on Hamrol's behalf on the ground that people would be relocating from the Hall of Justice to the Property. Tom told Romani that there was no provision in the Ordinance for such an exemption. (R.T. 59:11-25; 141:8-16.)

3. Attempts to Collect TIDF.

The TIDF Ordinance does not require payment of the fee until the earliest of three events: (a) 50 percent of the net rentable area of the project has been occupied; (b) the first office temporary permit of occupancy has been issued; or (c) a final certificate of occupancy has been issued. (Pl. Exh. 3, § 38.4.E, R.A. 5.) If the PUC does not

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[4] As a result of a San Francisco Charter Amendment, as of July 1, 1994, the former transportation functions of the PUC (including administration of the TIDF Ordinance) have been under the control of the newly created Public Transportation Commission. For historical accuracy, however, we will continue to refer to the PUC.

receive a temporary permit of occupancy or request for final certificate of occupancy from the Bureau of Building Inspection, the PUC's staff conducts periodic field surveys of properties to determine occupancy level. (R.T. 71:25-72:7.)

The PUC received no temporary permit of occupancy or request for final certificate of occupancy for the Property. (R.T. 129:5-7.) A routine inspection by PUC staff on September 3, 1993 revealed that the building was fully occupied at that time. (Pl. Exh. 12, R.A. 23.) Beginning September 15, 1987, the PUC sent Hamrol two requests for payment, followed by various delinquency notices. (R.T. 74:27-75:8; Pl. Exh. 13, R.A. 24; Pl. Exh. 14, R.A. 25; Pl. Exh. 19, 20, 21, R.A. 34-37.)

On July 26, 1988, the PUC passed a resolution requesting the City's Board of Supervisors to impose a special assessment lien on the Property as provided in Sections 38.10 *et seq.* of the TIDF Ordinance. (Pl. Exh. 22, R.A. 38.) After hearings before the Board of Supervisors in August and September 1988, the Board tabled the item in order for the PUC and Hamrol to try to settle the matter. (R.T. 88:5-89:5; 89:28-91:18; 99:13-102:9.)

As part of the settlement discussions, Hamrol wrote to Leonard Tom on November 21, 1988, suggesting that there was a discrepancy in the calculation of usable floor space in the Property for TIDF purposes. (Pl. Exh. 26, R.A. 39.) Hamrol sent Tom floor plans of the building and documentation about prior office use on the Property. Tom also conducted a tour of the site. Based on the subsequent information, Tom reduced the amount of the fee to $146,940.35 on February 15, 1989. The reduction

was meant to account for prior office occupancy on the site and non-office use in the building. (Pl. Exh. 29, R.A. 41-43; R.T. 104:18-105:7; 107:1-26.) The parties continued to try to resolve the matter, but without success. (R.T. 109:4-14, 110:15-113:1.)

On June 12, 1990, the PUC again voted to request the Board of Supervisors to impose a lien on the Property. (Pl. Exh. 33, R.A. 44). The Board declined to impose the lien, but formally requested the San Francisco City Attorney to work with the PUC and Hamrol to resolve the dispute. (Pl. Exh. 34, R.A. 45-49.)

On November 13, 1990, the PUC approved a settlement regarding payment of the TIDF. (Pl. Exh. 41, R.A. 116-21.) The settlement was contingent on the Department of Real Estate's deciding, by December 3, 1990, to recommend that the City exercise the first five-year option of the lease, due to expire on June 30, 1991. (R.A. 117-18.) On December 10, 1990, the City's Director of Property notified Hamrol by letter that he had decided not to recommend exercise of the option. Instead, he requested a meeting to discuss a lease extension. (Def. Exh. 1013, R.A. 138.) Thus, the settlement never became effective.

The City and Hamrol subsequently negotiated a new 10-year lease effective July 1, 1991. (Def. Exh. 1014, R.A. 140-47.) The TIDF was not made a part of the negotiations for the new lease. (R.T. 289:2-5).

The City filed this action on September 17, 1990 (R.A. 148). The trial court ruled in favor of the City. The court awarded the City the TIDF principal of $146,940.35, plus

pre-judgment interest from September 15, 1987 through the date of judgment. (A.A. 7, 25:18-27.)

The Court of Appeal affirmed. Among other things, the Court dismissed Hamrol's argument that his building derives no benefit from the fee, even though, initially, the occupants of the Property moved from the nearby Hall of Justice. The Court of Appeal reasoned as follows:

> [A]ppellant stands in no different shoes from any other developer of new office space whose building has, for example, an unusually short useful life or whose building is occupied by persons who (a) are not users of public transit or (b) are relocating from other downtown office space.

[Pet. at 8a.]

On December 14, 1994, the California Supreme Court denied Hamrol's Petition for Review.

REASONS FOR DENYING THE WRIT

I. THE CASE PRESENTS NO ISSUES WORTHY OF THIS COURT'S REVIEW AS THE COURT OF APPEAL'S HOLDING IS CONSISTENT WITH FEDERAL LAW

Hamrol contends that review by this Court is necessary because the Court of Appeal allegedly did not comply with prior holdings of this Court. Hamrol relies primarily on the recent case of *Dolan v. City of Tigard, supra,* 114 S.Ct. 2309, which addressed an issue left open by the Court in *Nollan v. California Coastal Commission,*

supra. However, Hamrol's statement of the issues incorrectly presumes that *Dolan's* "individualized determination" analysis applies in this case. *Dolan* clearly does not apply to the application of the TIDF to Hamrol's property.

A. *Dolan* Does Not Apply to This Case.

Hamrol contends that *Dolan* requires the City to have made an "individualized determination" regarding the transit impact generated by the Property before imposing the TIDF. Hamrol is wrong.

First, *Dolan* is a "dedication" case. In *Dolan*, the local City Planning Commission conditioned the approval of Dolan's application to expand her store and pave her parking lot on Dolan's dedicating land for a public greenway and a pedestrian/bicycle pathway. This Court determined that the findings relied on by the city did not show a reasonable relationship to the projected impact of the proposed development. 114 S.Ct. at 2319-21. This case does not involve a physical dedication of property for public use.

Second, *Dolan* involved a single, *adjudicative* determination, not the implementation of an ordinance of general application. In *Dolan*, this Court expressly *distinguished* cases involving an *adjudicative* decision to condition issuance of a building permit for an individual parcel on a dedication, from those involving *"legislative* determinations classifying entire areas of the City." *Id.* at 2316 (emphasis added).

The TIDF Ordinance is a classic example of the "legislative determination" referred to in *Dolan*. The TIDF

Ordinance is a police power ordinance that operates generally and has an obligatory effect on the community. *See* 5 McQuillin, *Municipal Corporations* § 15.11 (3d ed. 1989). The Ordinance resulted from studies to determine the anticipated incremental cost to the City's public transit system of providing additional peak period service in the downtown area of San Francisco. *See Russ Bldg. I,* 199 Cal.App.3d at 1511. *In Russ Bldg. I,* the court found that the TIDF "is directly tied to the increase in ridership that this construction will possibly generate" and "limited to the estimated costs involved to serve the increased ridership." *Id.* at 1505. The court arrived at this conclusion despite the fact that the Ordinance does not depend on or adjust for the actual transit impact for an individual building. Citing *Russ Bldg. I,* at 1503, the Court of Appeal in this case explained:

> The amount of the TIDF reflects anticipated increased transit costs generated over a 45-year life of each building; and the Ordinance provides for a uniform distribution of costs over all new office space without adjusting for either the actual life of any individual building or the actual incremental transit burden occasioned by an individual building.[5]

[Pet. at 8a.]

Despite judicially approved legislative findings demonstrating the need for the fee, Hamrol would have the City prove a transit impact "nexus" each time the City

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[5] The Court in *Russ Bldg. I* stated: "There is no provision [in the Ordinance] for adjusting the amount owed by each owner depending on the actual 'life' of the building or actual transit operation costs." *Id.* at 1503.

attempted to impose the fee. This argument ignores the purpose of an ordinance of general application; such an ordinance does not depend on, nor is it designed to take into consideration, individual projects. Raising this garden variety case to constitutional dimensions potentially thwarts the ability of a municipality to apply valid police power ordinances such as the TIDF Ordinance to those property owners covered by its provisions.

The wisdom of the *Dolan* distinction between legislative and adjudicative determinations is dramatically illustrated by the procedural history of this case. Here, Hamrol, a member of the class in *Russ Bldg.*, did not sue the City to prevent application of the fee to him. Rather, he waited to raise his constitutional objections in a suit by the City to collect the fee and asserted that the City must prove that his new office building will impact transit. Hamrol never explains, however, when the City should have made the "individual determination" regarding his building. The City could not have made the determination at the time the TIDF Ordinance was passed because Hamrol did not own the property then. Similarly, there is no mechanism in the Ordinance for the City to make such a determination or hold an adjudicative hearing at the time the fee is imposed.[6] Finally, such a hearing during a

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[6] The only hearings provided for in the Ordinance for individual properties are an appeal to the PUC regarding whether the amount of the fee correctly represents the gross square feet of office use subject to the fee, credits for prior uses, or useful-life category (§ 38.8), and in conjunction with delinquency and lien proceedings (§§ 38.10, 38.12). (Pl. Exh. 3, R.A. 10, 13.) On the other hand, the Ordinance requires the overall fee schedule be reviewed annually to ensure that the fee accurately measures

trial to collect the fee would make little sense. In this case, the trial occurred five and a half years after the building was completed.

This is not a case of an adjudicative body of the City conditioning a building permit with a particular exaction. Rather, the City, under its police powers, passed an Ordinance applicable to all property owners within a defined area. The trial court characterized the TIDF Ordinance as "the essence of police power legislation – rules equally applicable to all based upon reasonable generalizations." (A.A. 7, 10:1-3.) This Court's decision in *Dolan* acknowledges that a municipality's legislative body must be given latitude to pass ordinances of general applicability such as the TIDF Ordinance.

B. This Court's Decision in *U.S. v. Sperry* Provides the Proper Framework for Analysis.

The decision of the court below is also consistent with this Court's decision in *U.S. v. Sperry Corp., supra,* 493 U.S. 52, a case involving a legislatively imposed fee. *Sperry* concerned a user fee to cover the costs of the Iran-United States Claims Tribunal. Sperry argued that the charge for use of the Claims Tribunal was not a valid user fee because there was no showing that the amount of the deduction approximated the cost of the Tribunal or bore any relationship to the value of the Tribunal's services to Sperry.

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the costs of providing additional peak-period public transit (§ 38.6).

This Court rejected the argument and reversed the only federal appellate decision to invalidate a user fee as an unconstitutional taking. The Court concluded that such a financial exaction would be upheld "if it is made for the purpose of paying a social cost that is *reasonably related* to the activity against which the fee is assessed." *Id.* at 60 (emphasis added).

Giving deference to the *legislative findings* that the purpose of the fee was to reimburse the United States for costs associated with the Tribunal, the Court ruled that the *burden was on Sperry to prove the lack of a nexus. Id.* at 60. This point also distinguishes the present case from *Dolan*. In a case involving an adjudicative decision to condition a building permit on a dedication, *Dolan* puts the burden on the entity imposing the individual condition. 114 S.Ct. at 2319-20 & n.8.[7] By contrast, the *Sperry* Court places the burden on the feepayer to demonstrate a lack of any nexus.[8]

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[7] Hamrol claims that the City has admitted that his project will impose no burden on transit. The record does not include any such admission. Moreover, Hamrol's argument misses the point of the TIDF. As explained by the Court of Appeal, "the Ordinance provides for a uniform distribution of costs over all new office space without adjusting for either the actual life of any individual building or the actual incremental transit burden occasioned by an individual building." (Pet. at 8a.)

[8] Indeed, this Court suggested that Sperry might be required to pay a charge for the *mere availability* of the service even if Sperry had not actually used the service. *Id.* at 63; *see also State of Me. v. Department of Navy*, 973 F.2d 1007, 1014 (1st Cir. 1992) (regulatory fee for state environmental services upheld against Navy even though Navy had never used services).

Federal courts have had no trouble following *Sperry*. For example, the Ninth Circuit in *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1997 (1992), upheld an ordinance imposing a low-income housing fee on new non-commercial development. In *Atlas Corp. v. United States*, 895 F.2d 745, 756-58 (Fed.Cir. 1990), *cert. denied*, 111 S.Ct. 46 (1990), the court rejected the claim of a producer of uranium and thorium that federally mandated cleanup costs upon termination of its license effected a taking. The court ruled in this way despite the company's allegations that the amount of money it would be required to spend was greater than the value of the mill.[9]

Hamrol asks this Court to decide an issue that is already resolved. *Sperry*, as well as subsequent decisions of federal courts, support the City's position that a legislatively imposed regulatory or user fee does not require the standard of analysis applied in *Dolan* to possessory takings.

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[9] *See also Center for Auto Safety, Inc. v. Athey*, 37 F.3d 139, 143 (4th Cir. 1994) (charitable solicitations law establishing sliding scale fee based on charity's nationwide level of public contributions upheld); *Colorado Springs Production Credit Ass'n v. Farm Credit Admin.*, 967 F.2d 648 (D.C. Cir. 1992) (federal statutory requirement that production credit associations make one-time purchase of stock from Farm Credit System Financial Assistance Corp. to avert financial crisis in Farm Credit System not a taking); *Meier v. Anderson*, 692 F.Supp. 546, 554 (E.D. Pa. 1988) (surcharge on health care providers to finance fund to compensate malpractice victims not a taking); *Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988) (sanctions against Libya resulting in termination of petroleum engineers' employment contracts with Libyan oil companies not a taking).

Hamrol mistakenly relies on *Ehrlich v. City of Culver City*, 15 Cal.App.4th 1737 (1993), *cert. granted, vacated and remanded*, 114 S.Ct. 2731 (1994), *aff'd on reconsideration*, No. B055523 (Ct. App. Dec. 23, 1994), *rev. granted*, No. S033642 (Sup. Ct. Mar. 16, 1995). for the principle that *Dolan* applies to fee exaction cases.

First, this Court's remand is not a final determination on the merits. *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964). Nor has there been a final determination in *Ehrlich*, since the California Supreme Court has just decided to review the new decision of the Court of Appeal.

More importantly, the mitigation fee in *Ehrlich* fundamentally differs from the TIDF. The fee in *Ehrlich* was individually imposed on the developer as a permit condition; it was not neutrally imposed pursuant to an ordinance of general application, such as the TIDF Ordinance. Thus, *Ehrlich* has no bearing on this petition.

II. THIS PETITION RAISES NO LEGAL ISSUES DIFFERENT FROM PRIOR PETITIONS WHICH THIS COURT HAS DECLINED TO REVIEW

This Court has repeatedly declined to review the decisions of lower courts in cases involving legislatively imposed development fees. In *Commercial Builders, supra*, 941 F.2d 872, this Court let stand the Ninth Circuit's decision upholding the constitutionality of an ordinance conditioning issuance of nonresidential building permits on payment of a low-income housing fee. 112 S.Ct. 1997.

In addition, this Court has declined to review the TIDF Ordinance on two previous occasions. The Court dismissed the appeal in *Russ Bldg. II*, supra, 44 Cal.3d 889 (application of TIDF to two buildings approved, with transit mitigation conditions, prior to passage of Ordinance). 488 U.S. 881. Then, in 1992, the Court denied *certiorari* in *Blue Jeans Equities West, supra,* 3 Cal.App.4th 164 (application of TIDF to another office building approved, with transit mitigation condition, prior to passage of Ordinance). 113 S.Ct. 191.

Both *Commercial Builders* and *Blue Jeans* were decided after *Nollan, supra.* Nothing in *Dolan* provides a basis that would distinguish the instant case from any of the prior cases addressing the TIDF or legislative development fees. Rather, as explained above, *Dolan* expressly distinguishes legislative conditions on development from those adjudicatively imposed. There is no issue here worthy of this Court's review.

CONCLUSION

Hamrol has failed to present an important issue of law to be settled by this Court. The Petition should be denied.

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Respectfully submitted,

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